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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

MARIA PAN,

Plaintiff and Appellant,

v.

CITY OF SUNNYVALE,

Defendant and Respondent.

H040782

(Santa Clara County

Super. Ct. No. CV252615)

Plaintiff Maria Pan brought an action against defendant City of Sunnyvale (City) for fraud and deceit, discrimination, and defamation. Pan appeals from a judgment of dismissal after the trial court sustained City’s demurrer without leave to amend. The judgment is affirmed.

**I. Standard of Review**

“‘A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]’ [Citation.] Thus, the standard of review on appeal is de novo. [Citation.] ‘In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially

noticed.” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]’ [Citations.]” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.)

“A trial court has discretion to sustain a demurrer with or without leave to amend. [Citation.] If we determine that the plaintiff has met its burden to demonstrate that a reasonable possibility exists that the defect can be cured by amendment of the pleading, then the trial court has abused its discretion in denying leave to amend and we reverse the denial. [Citation.] Otherwise, we affirm the judgment on the basis that the trial court has not abused its discretion. [Citation.]” (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031.)

“To satisfy that burden on appeal, a plaintiff ‘must show in what manner he [or she] can amend his [or her] complaint and how that amendment will change the legal effect of his [or her] pleading.’ [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*).)

## **II. Procedural and Factual Background**

In November 2011, City held an election for seats on the city council. According to the results, as reported by the Santa Clara County Registrar of Voters, Pan received 1,759 votes and Tara Martin-Milius received 7,601 votes for seat 7.

On December 19, 2011, Pan filed an election contest pursuant to Elections Code section 16100<sup>1</sup> and alleged that there was an error in the vote-counting programs or summation of ballot counts.

In January 2012, Martin-Milius was seated on the city council pursuant to former section 601 of the Sunnyvale City Charter.<sup>2</sup>

Following a trial in February 2012, the court concluded that Pan had failed to meet her burden of showing by clear and convincing evidence that the election was illegal or that the vote tallies were in error. Pan did not appeal from that judgment.

In May 2012, Pan filed a second election contest and alleged that Martin-Milius and/or her supporters bribed the registrar of voters. The trial court granted the motion to dismiss by Martin-Milius with leave to amend. Pan did not amend her petition and dismissed it without prejudice in October 2012.

In January 2013, Pan filed a tort claim against the City. The claim was denied.

In October 2013, Pan filed her first amended complaint against the City. The first cause of action for fraud and deceit alleged that on March 15, 2012, the City received notice that the results of the November 2011 election were incorrect, that is, that the three candidates sworn into office in January 2012 did not receive the majority of votes. The City concealed this fact, misrepresented that the council members were elected by the voters, and misrepresented that Pan was disqualified. When the City made these representations, it knew them to be false and made them with the intent to deceive and

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<sup>1</sup> All further statutory references are to the Elections Code unless stated otherwise.

<sup>2</sup> This court has taken judicial notice of former section 601 of the Sunnyvale City Charter. (Evid. Code, § 451.)

defraud the public. As a result of these misrepresentations, Pan lost her opportunity to serve the public and gain compensation. Since the City engaged in “despicable conduct,” Pan was entitled to punitive damages.

The second cause of action for discrimination alleged that the City’s population consisted of “approximately 40% Asian, 35% non-Hispanic White, 18% Hispanic, and 7% Hispanic White.” Pan is “Chinese, disabled and Roman Catholic.” The City discriminated against Pan when it “excluded [her] to maintain an all-White Non-Hispanic surnamed City Council.” As a result of the City’s discriminatory acts, Pan suffered severe emotional distress. Since the City’s acts were “willful, wanton, malicious and oppressive,” Pan was entitled to punitive damages.

The third cause of action for defamation alleged that the City “gave the explanation to the public that [Pan] was disqualified from being sworn into office because she was mentally ill.” The City also defamed her by “fabricating lies about her as a spy, prostitute, murderer and child molester.” The City further defamed her by “fabricating lies that [Pan] falsified her age, her educational credentials, and her family background as former members of the diplomatic corps (Taiwan).” In committing these acts, the City inflicted severe emotional distress on Pan. Since the City’s acts were “willful, wanton, malicious and oppressive,” Pan was entitled to punitive damages.

In November 2013, the City filed a demurrer to the first amended complaint and a request for judicial notice. The City argued that Pan’s pleading was barred by the statute of limitations, res judicata, collateral estoppel, and failure to plead sufficient facts to state a cause of action. Pan did not file written opposition to the demurrer.

When the hearing on the demurrer was held, Pan appeared and requested a continuance to seek legal representation. The City opposed the request. Pan then stated that she could amend the pleading by providing the facts regarding the defamation and discrimination causes of action. She argued that she was “not contesting the election but

rather stating that the Defendant received notice of a set of true results and those are the facts, and the Defendant's disputing the facts." Pan also argued: "I believe that the Secretary of State has the -- of California has the authority to override the registrar of voters. And I believe that the Secretary of State requested the registrar of voters to recertify the results. However, they refused to do so and --"

Following argument, the trial court granted the City's request for judicial notice and sustained the demurrer without leave to amend.

### **III. Discussion**

The underlying basis for Pan's first amended complaint is that she was elected to a seat on the city council and the City wrongfully declared that she had not been elected to this office. The City contends that an election contest is the exclusive means for challenging the outcome of an election. We agree with the City.

"The purpose of an election contest is 'to ascertain the will of the people at the polls, fairly, honestly and legally expressed.' [Citations.] 'Strict rules embodied in the Elections Code govern a court's review of a properly contested election. "It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citations.]'" [Citation.]' [Citation.]" (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192.) (*Friends of Sierra Madre*).

The statutory provisions regarding election contests are set forth in section 16000 et seq. A trial court's authority to invalidate an election is limited to the grounds specified in section 16100: misconduct by elections board members, ineligibility of the person declared elected to an office, bribery, illegal votes, denial of eligible voters' right to vote, errors in the conduct of the election or canvassing of returns, or errors in the vote-counting programs or summation of ballot counts. (*Friends of Sierra Madre, supra*,

25 Cal.4th at pp. 192-193.) In a general election, an election contest must be filed within 30 days from the date that the results are certified, or six months in cases of bribery. (§ 16401.)

In the present case, Pan is seeking compensatory and punitive damages arising from the City's refusal to seat her. However, Pan has not cited any legal authority recognizing a private right of action to obtain damages based on the outcome of an election. The City correctly points out that an election contest or a quo warranto action by the Attorney General (Code Civ. Proc., § 803) are the exclusive means to overturn an election or remove an elected official from office. (See, e.g., *Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, 1173; *People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 932-933; *Nicolopoulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225-1226.) Pan counters that these cases are distinguishable, because they involve losing candidates and she is "the winning candidate." Pan has overlooked that the issue of whether she was the winning candidate was resolved against her in two election contests, which were her exclusive means to challenge the election results.

*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 recently explained the doctrine of collateral estoppel or issue preclusion: "*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. [Citation.] There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party. [Citation.] [¶] Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit. [Citation.]

‘Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding. [Citations.]’ [Citation.] In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. [Citations.]” (*Id.* at pp. 824-825.)

Here, Pan has already litigated the issue of which candidate was lawfully elected to the city council in two election contests. The judgments denying Pan’s election contests are final. Thus, collateral estoppel or issue preclusion prevents the relitigation of this issue.

Nor are we persuaded by Pan’s argument that there is a reasonable possibility that the first amended complaint can be amended and thus the trial court abused its discretion in denying her leave to amend.<sup>3</sup>

In her first cause of action for fraud and deceit, Pan alleges that the City concealed the fact in March 2012 that she was the winner of the November 2011 election. At the hearing on the demurrer, she asserted that her complaint could be amended to reflect that the registrar of voters refused the request by the Secretary of State “to recertify the results.” She now also asserts that her complaint can be amended to include the following: (1) “[t]he involvement of the California Secretary of State and the Santa Clara

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<sup>3</sup> Pan has also included additional amendments to her first amended complaint in her reply brief. “As a general rule, points not addressed until a reply brief will not be considered unless good reason is shown for failing to address them earlier.” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. 10.) “‘Obvious considerations of fairness in argument demand that the appellant present all of his [or her] points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his [or her] opportunity to answer it . . . . Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. [Citations.]’” (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) Pan has failed to articulate any reason for failing to include these amendments in her opening brief. Accordingly, we will not consider them.

County Registrar of Voters in the recertification of the election results;” and (2) “[t]he City officials knowledge of the alleged falsity of the election results – my reliance on the misrepresentations, and the damages which I incurred, including the filing of a second election contest.”

“‘The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.’ [Citations.]” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

As to the element of misrepresentation, that is, that the City concealed the fact that the Secretary of State directed the registrar of voters to “recertify” the election results, Pan asks this court to accept as true an act by the Secretary of State which is not authorized by any statute. We decline to do so. Section 15500 addresses the role of the Secretary of State in elections and provides in relevant part: “The Secretary of State, commencing with the first results from the semifinal official canvass received from the elections officials, shall compile the results for the offices and measures listed in Section 15151, which compilation shall be continued without adjournment until completed. The Secretary of State shall immediately make public the results of the compilation as to those offices and measures.” However, section 15151 refers only to statewide elections, state ballot measures, and elections to state offices.<sup>4</sup> Moreover, a local elections official

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<sup>4</sup> Section 15151 provides: “(a) The elections official shall transmit the semifinal official results to the Secretary of State in the manner and according to the schedule prescribed by the Secretary of State prior to each election, for the following: [¶] (1) All candidates voted for statewide office. [¶] (2) All candidates voted for the following offices: [¶] (A) State Assembly. [¶] (B) State Senate. [¶] (C) Member of the United States House of Representatives. [¶] (D) Member of the State Board of Equalization. [¶] (E) Justice of the Court of Appeals. [¶] (3) All persons voted for at the presidential primary or for electors of President and Vice President of the United States. [¶] (4) Statewide ballot measures. [¶] (b) The elections official shall transmit the results to the



is not even required to report the results of local elections to the Secretary of State. (§ 15301 [“The canvass shall commence no later than the Thursday following the election, shall be open to the public, and, *for state or statewide elections*, shall result in a report of results to the Secretary of State.” (Italics added.)].) Given that the “misrepresentation” is legally impossible, Pan has failed to state a cause of action for fraud and deceit.

Pan’s reliance on former section 12172.5 of the Government Code is misplaced, because it provides no authority for the Secretary of State to direct a local elections official to “recertify” election results.<sup>5</sup> In the event that the Secretary of State “concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General.” (Former Gov. Code, § 12172.5.)

As to the element of reliance, Pan cannot show that she relied on any alleged misrepresentation by the City. Pan demonstrated that she did not believe the election

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Secretary of State at intervals no greater than two hours, following commencement of the semifinal official canvass.”

<sup>5</sup> Former section 12172.5 of the Government Code provides: “The Secretary of State is the chief elections officer of the state, and shall administer the provisions of the Elections Code. The Secretary of State shall see that elections are efficiently conducted and that state election laws are enforced. The Secretary of State may require elections officers to make reports concerning elections in their jurisdictions. [¶] If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elections officer in discharging his or her duties. [¶] In order to determine whether an elections law violation has occurred the Secretary of State may examine voted, unvoted, spoiled and canceled ballots, vote-counting computer programs, vote by mail ballot envelopes and applications, and supplies referred to in Section 14432 of the Elections Code. The Secretary of State may also examine any other records of elections officials as he or she finds necessary in making his or her determination, subject to the restrictions set forth in Section 6253.5. [¶] The Secretary of State may adopt regulations to assure the uniform application and administration of state election laws.”

results when she filed two election contests. Accordingly, the trial court properly sustained the demurrer as to the fraud and deceit cause of action.

Pan also failed to show that she can amend the second cause of action for discrimination. The second cause of action alleged that Pan is “Chinese, disabled and Roman Catholic” and the City discriminated against her when it “maintain[ed] an all-White Non-Hispanic surnamed City Council.” She now claims that the discrimination cause of action can be amended to include “[t]he individuals who discriminated against me and harbored covert bias against me, including racial prejudice.”

Pan has not articulated a legal basis for her claim. However, we will assume that Pan is relying on 42 U.S.C. § 1983. In order to maintain an action under this statute, a plaintiff must allege that a person acting under color of state law violated his or her constitutional or federal statutory rights. (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 516.) As previously discussed, Pan cannot rely on the City’s alleged misrepresentation regarding the “correct results” of the November election as the basis for her violation of constitutional rights claim. Since Pan has not set forth either in her first amended complaint or in her opening brief specific factual allegations that state the required elements for this cause of action (*Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44), the trial court did not abuse its discretion in denying Pan leave to amend.

We next consider the third cause of action for defamation. “The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.)

The first amended complaint alleged that the City: (1) told the public that Pan was disqualified from office, because she was mentally ill; (2) falsely stated that she was a spy, prostitute, murderer, and child molester; and (3) claimed that she falsified her age, education, and family background. Pan asserts that she could amend the third cause of

action to include “[t]he individuals who either spoke, wrote or published the defamation and to what parties,” and “[w]hen the defamation occurred and whether the individuals involved were City employees or officials.” Rather than making factual and specific allegations, Pan fails to state the names of the individuals who made the statements, whether they were City employees or officials, whether the statements were published orally or in writing, and even when the statements occurred. (*Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44.) Accordingly, the trial court did not abuse its discretion in denying Pan leave to amend the cause of action for defamation.

#### **IV. Disposition**

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Grover, J.

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